In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1947

THOMAS E. JOYCE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 73-1980

HARRY WALLACE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the evidence was insufficient to support their convictions. Petitioner Joyce also contends that he was denied the right to a speedy trial and to cross-examine a witness, and that it was error to convict him of two offenses for two separate mailings involving the same letter.

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner Joyce was convicted on seven counts (Counts 1, 8-11, 13, 15) and petitioner Wallace on one count (Count 5) of a 15 count indictment charging them with mail fraud in violation of 18 U.S.C. 1341.[1]

The evidence showed that petitioners, and co-defendants Sherre and Ostrander,[2] devised a scheme to defraud firms engaged in the business of placing insurance risks, certain state departments of insurance, and persons who were induced to purchase insurance policies from Global Surplus and Excess Limited ("Global") (Joyce Pet. App. 19-21). According to the proof in support of the allegations contained in Count 1, petitioners and their codefendants caused Global to enter into an Illinois land trust with the Cosmopolitan National Bank of Chicago. They represented that the trust was established to protect the United States and Canadian policy holders of Global. They thereupon conveyed certain Illinois real estate into the trust and represented that it was an asset of Global, and had the Cosmopolitan National Bank circulate copies of the

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[1]Prior to trial, on motion of the government, the district court dismissed Count 2 as to all defendants and Count 15 as to petitioner Wallace. Petitioner Joyce was found guilty on all 14 remaining counts, and petitioner Wallace on Counts 5, 6 and 8. The district court granted petitioner Joyce's post-trial motions for acquittal as to Counts 3 through 7 and 12 and 14, and petitioner Wallace's motion for acquittal on Counts 6 and 8. Petitioner Joyce was sentenced to a term of imprisonment for one year on Count 1 and fined $1,000 on each of Counts 8-11 and 13; imposition of sentence was suspended on Count 15 and he was placed on probation for 5 years. Petitioner Wallace was sentenced to a term of imprisonment for one year on Count 5. The court of appeals reversed petitioner Joyce's conviction on Count 13.

[2]Ostrander pleaded guilty to Count 14. Sherre was found guilty on Counts 7 through 15. The district court granted Sherre's post-trial motions for acquittal on Counts 7, 8, 12 and 14.

trust agreement to insurance brokers and agents and state insurance agencies to induce them to place and permit placing of insurance risks with Global. They also prepared letters of appraisal for the trust real estate assignment in excess of its value, and had the letters circulated to insurance brokers and agents and state insurance agencies in order to induce them to use and permit use of Global. In addition, they failed to advise that some of the trust real estate was heavily mortgaged. Petitioners and their co-defendants then formed a corporation called Global Surplus and Excess Limited of Illinois, and represented that it was a holding company for the real estate trust. They subsequently made a series of false representations in Global's financial statements, and illegally converted funds deposited in the checking accounts of various banks that had been deposited for the protection of Global policy holders.

Each of the counts on which petitioners were convicted involved a different mailing in violation of 18 U.S.C. 1341.

1. Petitioner Joyce contends that he was denied a speedy trial because of the delay of some 34 months before the indictment was returned. He argues that Rule 48(b), F.R.Crim.P.,[3] requires that where a defendant alleges that he has been denied a speedy trial, the government must prove that there has been no unneces-

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[3]Rule 48(b) reads as follows:

> If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

sary delay, regardless of whether or not the defendant has been prejudiced. He implies that the interpretation given *United States* v. *Marion*, 404 U.S. 307, by the court below (Joyce App. 32-36)[4] would in effect repeal the plain language of Rule 48(b).

a. As the court below correctly noted (Joyce Pet. App. 32-34), however, *Marion* held that both the Sixth Amendment's speedy trial provision and Rule 48(b) are applicable only to post-arrest or post-indictment proceedings, 404 U.S. at 319. Although the due process clause may require dismissal of an indictment if preindictment delay caused substantial prejudice to a defendant's right to a fair trial and was intentionally used, 404 U.S. at 324, petitioner Joyce has proved no intentional delay nor shown any prejudice resulting from the delay. There was therefore no error in the district court's denial of Joyce's motion for dismissal of the indictment for alleged failure of the government to grant him a speedy trial.

b. Petitioner Joyce also contends that he was denied a speedy trial due to post-indictment delays. As the court of appeals noted, however, the time between indictment and trial was only 12 months, the delay being attributable in varying part to the defendants, the government, the district court's docket, and the complexity of the case (Joyce Pet. App. 34-35). Furthermore, petitioner Joyce alleges no specific prejudice. In those circumstances the court below was correct in rejecting this claim (Joyce Pet. App. 35-36). See *Barker* v. *Wingo*, 407 U.S. 514.

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[4]References to documents contained in both petitioners' appendices will be cited to the appendix in No. 73-1947 only.

2. Petitioner Joyce contends that, as to three counts (Counts 1, 8 and 15), the proof was insufficient to show that the relevant documents were actually mailed. He further contends that, as to four counts (Counts 1, 8, 10 and 11), use of the mails bore too tenuous a relation to the scheme to warrant conviction under 18 U.S.C. 1341.

a. The evidence as to Count 1 showed that petitioner Joyce requested the Industrial Valley Bank and Trust Company to send him duplicate statements of Global's account with that bank, and that petitioner Joyce used the information he received from the bank in drawing a $2,359.65 check on the account in payment of an American Express bill—a use inconsistent with the purposes of the trust account. Knowledge of Global's balance in the account was therefore an essential element of the conversion scheme, and the evidence was sufficient for the jury to have found that the mailing occurred.

b. The evidence as to Count 8 showed that petitioner Joyce caused International Excess Agency of Cleveland, Ohio, to mail him a copy of its letter to Carl Brown in St. Louis, Missouri, which enclosed Joyce's false statement of assets so that Brown could secure approval for Global to do business in Missouri. The copy clearly furthered the fraudulent scheme since it was only through receipt of the copy that petitioner Joyce could keep track of "who had been told what in the scheme of misrepresentations" (Joyce Pet. App. 27), and the evidence was sufficient for the jury to find that the mailing occurred.

c. Counts 10 and 11 concerned a broker's inquiry addressed to the Cosmopolitan National Bank asking for the status of Trust No. 15385, the real estate trust established by Global (Count 10), and a letter from the assistant vice president of the bank to Global, stating that the inquiry should receive immediate attention (Count 11) (Joyce Pet. App. 29). Since the defendants were inducing insurance brokers to rely on the trust, the fraudulent scheme depended upon the Cosmopolitan Bank forwarding to the defendants all correspondence concerning the trust so that the defendants could continue their misrepresentations without the bank divulging the trust's real value. The jury was therefore entitled to consider these letters as furthering the scheme.[5]

d. The evidence as to Count 15 showed that petitioner Joyce caused a letter to be sent to E. P. Littlejohn & Son in Marshall, Texas, which expressed concern that a copy of a letter from an unpaid claimant had been forwarded to Cosmopolitan National Bank. Since the defendants did not want the bank to correspond with brokers and thereby divulge the true value of the trust, this letter furthered the fraudulent scheme.

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[5]In contrast to *United States* v. *Maze*, 414 U.S. 395, relied upon by petitioner Joyce, the scheme here was to earn profits by persuading people to place insurance with the undercapitalized company. Therefore, any letter which was incident to the running of Global and which tended to give the impression that all was well, that risks were adequately protected, and that business was being transacted normally, was in furtherance of the scheme under prior decisions of this Court approved in *Maze*. While inquiries to Cosmopolitan were aimed at detecting any fraud which might xist, it was necessary to permit such inquiries to persuade some victims that the trust was as represented. Defendants were found to have arranged favorable replies to such inquiries, so that these mailings were also in furtherance of the scheme. *Maze* does not affect the foregoing analysis of the mailings involved in this appeal.

3. Petitioner Joyce contends that the failure of the government to call the writer of the letter in Count 8 as a witness deprived him of his right to cross-examination. We note initially that because petitioner Joyce did not raise this issue in the court of appeals, it should not be considered by this Court. *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147, n. 2, citing *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16. In any event, the claim is without merit. Although the writer of this letter was not called by the government, the writer's superior at International Excess Agency testified as to the business practice of the company, and this was enough to show that the letter had been mailed. If petitioner Joyce wanted to examine the writer of the letter nothing prevented him from calling the writer as his own witness.

4. Petitioner Joyce finally contends that it was error to convict him on two separate offenses involving the same letter which had been twice sent through the mails, first as an inquiry to the Cosmopolitan National Bank (Count 10), and then by the bank to Global (Count 11). The second time the letter was placed in the mail, however, it was accompanied by a letter from the bank's vice president, stating that the inquiry should receive immediate attention. As has already been stated, the scheme depended upon the bank forwarding to the defendants all correspondence so that the defendants could continue their misrepresentations. Each use of the mail—the original inquiry to the bank, and the forwarding of the inquiry to the defendants—therefore furthered the scheme.

5. Petitioner Wallace contends that the evidence was insufficient to support his conviction on Count 5 (Wallace Pet. 9-16). As petitioner Wallace specifically states, however, he does not challenge the sufficiency of the proof of the underlying scheme (Wallace Pet. 5). Defendants were charged in Count 5 with the December 21, 1966 mailing of a letter to International Excess Agency in Cleveland, Ohio. The letter stated that Wallace, Joyce, and Ostrander had agreed that some of the cost of Sherre's legal services should come from Global funds held by Paterson's office. Paterson refused the request because the Ohio Department of Insurance had asked him to keep all of Global's funds in escrow. As the court of appeals correctly held, "[w]ith Wallace's and Joyce's consent, Sherre was attempting to obtain for himself funds that were segregated for the benefit of policyholders' claims in Ohio. The letter thus falls within the conversion scheme alleged" (Joyce Pet. App. 25-26). The court further stated (Joyce Pet. App. 26):

> At the time this letter was sent, Wallace was still active in Global's affairs. As a member of a mail fraud scheme, Wallace was responsible for any letter which any other member of the scheme caused to be mailed in execution of the scheme. *Pritchard* v. *United States*, 386 F. 2d 760, 764 (8th Cir. 1967), certiorari denied *sub nom. Borchelt* v. *United States*, 390 U.S. 1004; * * *.

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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